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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

Office: NEBRASKA SERVICE CENTER

Date: SEP 22 2010

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750 Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of experience stated on the labor certification. Specifically, the director determined that the petitioner failed to demonstrate that the beneficiary possessed five years of progressive experience in the specialty and two years of experience in the job offered or related occupation as required by the certified Form ETA 750 prior to the priority date.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: completion of grade school, high school and college; Master’s degree or Equivalent* in computer science, computer information systems (CIS), management of information systems (MIS), computer engineering, or mathematics

Experience: two years of experience in the job offered or related occupation of software developer or any experience providing skills in described duties

Block 15: * Will accept a Bachelor’s Degree in Computer Science, CIS, Computer Engineering, mathematics, plus five (5) years of progressing experience in lieu of a Master’s Degree and two (2) years of experience

The record contains the beneficiary’s bachelor of engineering in computer engineering awarded by the University of [REDACTED] and transcripts for his study at that university. There is no evidence showing that the beneficiary obtained a master’s degree. Therefore, the beneficiary met

the minimum level of education required for the equivalent of an advanced degree, namely a bachelor's degree, for preference visa classification under section 203(b)(2) of the Act prior to the priority date.

However, to qualify for the second preference classification in this case, the beneficiary must establish that he possessed at least five years of progressive experience in the specialty after his bachelor's degree but prior to the priority date as the regulation requires and two years of experience in the job offered or related occupation as the underlying labor certification specially required. The director determined that the evidence in the record did not establish that the beneficiary possessed the required experience. On appeal, the petitioner submits additional evidence and asserts that the beneficiary possessed all required experience.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains three documents regarding the beneficiary's requisite experience. The first document is a letter dated January 31, 2004 and signed by [REDACTED] Senior Executive – HR of [REDACTED] certifying that the beneficiary was working with that company as a software engineer from September 11, 2002 to January 31, 2004. On appeal counsel asserts that this letter verifies the beneficiary's one year four months and 20 days of qualifying experience for the proffered position. However, the AAO finds that this letter does not confirm the beneficiary's full-time employment, and does not include a specific description of the duties performed by the beneficiary. Without confirmation of the full-time employment and such a specific description, the AAO cannot determine whether the entire one year and four months of experience can be fully considered as qualifying experience for the beneficiary's qualifications and whether the beneficiary's experience with this company qualifies him to perform the duties described for the proffered position of programmer analyst in Block 13 of the Form ETA 750 Part A. Therefore, the January 31, 2004 letter from [REDACTED] does not meet the requirements set forth at 8 C.F.R. § 204.5(g)(1). Further, the record contains inconsistent information with the contents of this letter. The record contains the beneficiary's paystubs from the petitioner for the end of 2006 and beginning of 2007 and W-2 forms for 2004 through 2006. These paystubs indicate that the beneficiary was hired by the petitioner from January 1, 2003 and the beneficiary's W-2 forms for 2004 through 2006 show that the beneficiary worker for the petitioner in 2004, 2005 and 2006. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent objective evidence to resolve the inconsistency in this case. Thus, the AAO cannot accept and consider this letter as evidence of the beneficiary's qualifications.

The second document is a letter dated April 16, 2008 and signed by [REDACTED], manager of the petitioner. The representative of the petitioner certifies in the letter that the beneficiary worked for it from July 2000 to August 2002 as a full time position of Software Engineer. The letter includes a specific description of the duties the beneficiary performed. However, this letter does not confirm the location where the beneficiary was employed and his full-time employment. It is further noted that this letter is submitted for the first time on appeal despite specifically requested in the request for evidence (RFE) issued by the director on December 10, 2007. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

For the beneficiary's alleged employment with [REDACTED] counsel submitted an affidavit of the beneficiary, a copy of the beneficiary's payslip from the company, a letter from the beneficiary's co-worker at [REDACTED] and an appointment letter for the co-worker. The affidavit of the beneficiary is notarized on January 8, 2008. In his affidavit, the beneficiary certifies that he was employed with [REDACTED] as a Software Engineer from August 1998 to June 2000 and also provides a description of the duties he performed. However, without reasonable explanation why the evidence required by the regulation at 8 C.F.R. § 204.5(g)(1) is unavailable and independent objective evidence in support with the explanation, a statement from the beneficiary himself cannot be considered as primary evidence to establish his qualifying experience. The copy of the beneficiary's payslip proves that the beneficiary worked and was paid in June 2000 only, however, it does not establish that the beneficiary worked for the company in the job offered or related occupation specifically required on the Form ETA 750. While the appointment letter dated November 17, 1997 shows that [REDACTED] offered the beneficiary's co-worker a software engineer position starting August 1, 1998 or earlier, the record does not contain any other evidence showing that the co-worker accepted the job offered by the company eight months ago. Further, the co-worker's appointment letter cannot establish the beneficiary's employment with that company. The undated letter from [REDACTED] as the beneficiary's co-worker does not explain why his verification letter was provided instead of a letter from the beneficiary's former employer as required by the regulation at 8 C.F.R. § 204.5(g)(1), and it does not include a specific description of the duties the beneficiary performed at that company. In addition, the co-worker's letter provides inconsistent information with the beneficiary's affidavit. While the beneficiary claimed in his affidavit that he started working for [REDACTED] in August 1998, the co-worker's letter states that the beneficiary was working for the company from July 1998. For the reasons above, the AAO finds that documents submitted in the record concerning the beneficiary's alleged employment with [REDACTED] do not meet the requirements set forth at 8

C.F.R. § 204.5(g)(1), and thus, the AAO cannot be accepted them as evidence of the beneficiary's qualifications.

To qualify for the second preference classification in this case, the beneficiary must establish that he possessed at least five years of progressive experience in the specialty after his bachelor's degree but prior to the priority date as the regulation requires in lieu of the master's degree required on the Form ETA 750. In addition, the underlying labor certification specifically requires two additional years of experience in the job offered or related occupation. As discussed above, the petitioner failed to submit regulatory-prescribed evidence to establish that the beneficiary possessed five years of progressive experience in the specialty and two additional years of experience in the job offered or related occupation prior to the priority date. Therefore, the beneficiary does not meet the job requirements on the labor certification. For the reason mentioned above, the petition may not be approved.

Counsel's assertions on appeal cannot overcome the grounds of denial in the director's March 22, 2008 decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.